Nyeholt Steel, Inc. *and* Local 25, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO. Case 7–CA–36973(E)

April 10, 1997

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On July 24, 1996, Administrative Law Judge Steven M. Charno issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief, and the Applicant filed an answering brief and a petition for rulemaking.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Supplemental Decision and Order.[1]

1. In the February 14, 1996 decision in the underlying unfair labor practice case, the judge found that the Respondent unlawfully interrogated its employees in violation of Section 8(a)(1), but recommended dismissal of the complaint allegation that the Respondent unlawfully discharged five employees in violation of Section 8(a)(3) and (1). No exceptions were filed to the judge's decision and on March 22, 1996, the Board adopted, pro forma, the judge's findings and recommendation.

On April 18, 1996, the Applicant, the Respondent below, filed an application for an award of attorneys' fees and expenses under the Equal Access to Justice Act (EAJA) and Section 102.143 of the Board's Rules and Regulations. In his supplemental decision, the judge found that the General Counsel was not substantially justified in pursuing the discharge allegation. The judge, therefore, recommended granting the application.

The General Counsel excepts to the judge's supplemental decision. We find merit in the General Counsel's exceptions and for the reasons stated below reverse the judge's findings and deny the application.[2]

2. The judge's findings of fact in the underlying proceeding were as follows. In September 1994[3] the Union obtained authorization cards from five of the Respondent's eight employees. Before advising the Respondent of its employees' union activity, the Union received a request from another employer for four ironworkers for a job beginning September 29. The Union replied that it had available four experienced ironworkers, referring to the Respondent's employees who had signed authorization cards.

On Wednesday, September 28, the Union's business agent, Charles Dodson, came to the the Respondent's place of business to meet with General Manager Bruce Nyeholt. When they saw Dodson arriving, three of the authorization card signers (alleged discriminatees Craig Barnes, Adam Hutchinson, and Gonzalez) approached Supervisor Harvey and told him that they were beginning a union job the next morning and urged Harvey to come with them.

Dodson told Bruce Nyeholt that the Union represented a majority of the Respondent's employees. When Bruce Nyeholt refused to sign a contract, Dodson indicated that the employees would picket the facility during their lunchbreak.

Bruce Nyeholt immediately met with Harvey, and the two decided that the employees who signed union authorization cards should be given the remainder of the day off. Harvey then "asked everyone in the shop who was going with the Union" and told those who answered affirmatively to take the rest of the day off without pay. The Respondent did not normally send employees home early in the absence of bad weather. When the five card signers left, they took their personal tools with them, which was unusual. After their lunchbreak, during which time they picketed, the five employees inquired whether Harvey wanted them to work the remainder of the day. Harvey replied, "[N]o."

The alleged discriminatees returned at the end of the day to pick up their paychecks for the previous week's work. When one of them asked how they would be paid for the 3 days of the current week, the Respondent's president replied that checks would be mailed to them, and he obtained their names and addresses.

On September 29, four of the five alleged discriminatees began working for the other employer that had asked the Union to supply it with ironworkers.

3. In the underlying case, the judge found that the alleged discriminatees were not discharged, but had voluntarily quit. In the supplemental decision, the judge said that he relied on the following to make that finding: (a) no one claimed the Respondent at any time on September 28 told the alleged discriminatees they were terminated or not to return to work the next day; (b) before Dodson met with Bruce Nyeholt, three of the alleged discriminatees told Harvey they were going to work for another employer the next day; (c) before September 28, Dodson told another employer that the alleged discriminatees were available for work on September 29; (d) the alleged discriminatees took their

[1] In view of our reversal of the judge's finding that the Applicant is entitled to an award of attorneys' fees, it is unnecessary to rule on the Applicant's petition to raise the maximum hourly attorney fees.

[2] The General Counsel has attached to his exceptions brief the affidavits of Jesse Gonzalez, Roger DeYarmond, and Carl Harvey Jr. taken during the investigation of the charge. These affidavits are not part of the record. See the Board's Rules and Regulations, Sec. 102.150(c). We, therefore, do not rely on them in reaching our decision.

[3] All dates hereafter refer to 1994, unless otherwise indicated.

personal tools with them when they left the jobsite at noon on September 28, which was unusual; (e) one of the alleged discriminatees asked how he was to be paid for the week, a question the judge believed would make no sense if the employee intended to remain employed; and (f) four of the alleged discriminatees actually began working for the other employer the next day.

The judge in the supplemental decision addressed only the General Counsel's argument that findings (c), (d), and (e) turned on credibility resolutions. He held that he made no adverse credibility resolutions in making the three findings and concluded that the General Counsel failed to show the discharge allegation was substantially justified.

4. The Board has held that in order to avoid an EAJA award, the General Counsel must present evidence that, if credited, would constitute a prima facie case of unlawful conduct by the respondent. *SME Cement, Inc.*, 267 NLRB 763 fn. 1 (1983). We find the General Counsel presented evidence in the underlying proceeding that, if credited, would have constituted a prima facie case that the Respondent unlawfully discharged the alleged discriminatees.

We turn first to an analysis of a key factor on which the judge relied, i.e., finding (b) above, that the alleged discriminatees told the Respondent that they were quitting.[4] In our view, the judge erred in failing to recognize in his supplemental decision that this finding was grounded on a credibility resolution.

In the underlying decision, the judge acknowledged that this finding was based on crediting Harvey's testimony. In the supplemental decision, the judge stated only that the General Counsel did not allege that this finding was based on an adverse credibility resolution. As the General Counsel's exceptions argue, however, the finding that the three employees told Harvey they were quitting is contrary to the employees' version of the conversation.

To credit Harvey's testimony that the three employees told him they were quitting, the judge necessarily had to discredit Barnes and Hutchinson,[5] who both denied resigning or quitting their jobs with Nyeholt. In addition, Hutchinson testified that the employees told Harvey the Union had a contingency plan for them if Nyeholt fired them for attempting to organize. Specifically, in encouraging Harvey to join them, Hutchinson testified he told Harvey:

> Charlie Dodson's here from [the Union]. He's going in right now to offer a contract with Bruce. . . . [I]f Bruce gets . . . mad at us and he comes out here and fires us all . . . you don't need worry . . . Charlie said that he won't leave us hanging. That . . . we're not going to be stuck out in the cold with no job.

Had the judge credited the above-mentioned testimony,[6] he could have found that the three employees told Harvey they were seeking to organize the Respondent, that the Union had promised to provide them other employment if the Respondent fired them for organizing, and that they did not tell Harvey they were quitting. At the very least, such testimony is in conflict with Harvey's testimony that the employees told him they were quitting.

Further, had the judge made the findings set forth in the previous paragraph, such findings—coupled with the Respondent's unfair labor practice,[7] the evidence of additional hostility toward the card signers,[8] the Respondent's abrupt action in sending home "everyone in the shop . . . going with the Union," and the Respondent's refusal to allow the employees to return to work after their lunchbreak—would have supported a conclusion that the employees reasonably believed they had been discharged. See *NLRB v. Hilton Mobile Homes*, 387 F.2d 7, 9 (8th Cir. 1967) ("the fact of discharge does not depend on the use of formal words of firing," but whether the employer's actions or words "would reasonably lead the employees to believe that they had been discharged"), quoted in *Ridgeway Trucking Co.*, 243 NLRB 1048 (1979), enfd. 622 F.2d 1222 (5th Cir. 1980).[9] In short, had the judge credited Barnes' and Hutchinson's testimony mentioned above and discredited Harvey's testimony, there would have been a prima facie case of unlawful discharge.

The remaining factors on which the judge relied give rise to more than one reasonable inference. For example, it is undisputed that the employees' taking their personal tools with them when they left at noon on September 28 was unusual. However, the judge's inference from this fact that the employees quit was not the only reasonable inference that could be drawn: Employees who thought they were discharged might

[4] As mentioned above, the judge found that three of the alleged discriminatees told Harvey they were beginning a union job the next morning. Although the judge never used the words "quit" or "resigned," the only possible construction of his findings, given the testimony he credited, is that he believed the employees told Harvey they were quitting.

[5] Gonzales, the third employee who approached Harvey, did not testify.

[6] Neither Barnes nor Hutchinson was specifically asked about Harvey's testimony that they told him they were beginning a union job the next day. It is incorrect, however, to find that the record contains no evidence contrary to Harvey's version of the conversation simply because no one asked Barnes and Hutchinson to deny making such a statement, given the testimony mentioned above.

[7] The judge found in the underlying decision that the Respondent coercively interrogated the alleged discriminatees separately concerning their union activity.

[8] Hutchinson testified that he overheard Bruce Nyeholt accuse one of the card signers of being disloyal.

[9] Thus, the fact that the employees were not expressly told that they were terminated—factor (a) on which the judge relied—is not determinative.

also have taken their personal tools with them when they left. Similarly, it is undisputed that the Union spoke with another employer about arranging jobs for some alleged discriminatees before September 28 and that four of the alleged discriminatees began working at these jobs on September 29. However, these facts would support an inference that the Union was making contingency plans in the event the employees were discharged or decided to strike and that once the employees were terminated on September 28, the contingency plan was put into effect.[10] Finally, the judge inferred from the question about how employees would collect their pay that the employees did not plan to return.[11] However, an employee who believed he was discharged in the middle of a pay period might also ask such a question.

In view of the above, we find that the General Counsel acted reasonably in issuing the complaint's discharge allegation and proceeding to a hearing at which the judge could assess the credibility of the witnesses and weigh the evidence in light of those findings. We, therefore, conclude that the General Counsel's position was substantially justified throughout the proceeding. Accordingly, we dismiss the application for attorney's fees and expenses.

ORDER

The National Labor Relations Board reverses the recommended Order of the administrative law judge and orders that the application of the Applicant, Nyeholt Steel, Inc., Holt, Michigan, for attorneys' fees and expenses under the Equal Access to Justice Act is denied.

[10] We do not agree with the judge's statement in the supplemental decision that the earliest the alleged discriminatees' "purported confusion" about being discharged could have arisen was 5 p.m. on September 28. At the very least, the employees' testimony contradicts this statement.

[11] In connection with this point, the judge found that the General Counsel's investigation of the charge was improperly conducted. We do not agree with the judge's criticism of the investigation or the inferences he drew from the way the General Counsel chose to oppose the EAJA application.

Richard F. Czubaj, Esq., for the General Counsel.
Timothy J. Ryan, Esq. and *Randy McNitt, Esq. (Miller, Johnson, Snell & Cummiskey, P.L.C.)*, of Grand Rapids, Michigan, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

STEVEN M. CHARNO, Administrative Law Judge. On May 4, 1995, the General Counsel issued a complaint which, as amended, alleged that Nyeholt Steel, Inc. (Nyeholt) had violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by (1) coercively interrogating its employees and (2) discriminatorily discharging five of them. Nyeholt denied the commission of any unfair labor practice, and a hearing was held before me in Lansing, Michigan, on September 19, 1995. Posthearing briefs were thereafter filed by the General Counsel and Nyeholt. On February 14, 1996, I issued a decision which found that (1) Nyeholt had coercively interrogated its employees and (2) the General Counsel had failed to prove that Nyeholt discharged five employees. No exceptions were filed, and the Board adopted my findings by order of March 22, 1996.

On April 18, 1996, Nyeholt filed an application for attorneys' fees and expenses (application) pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504, et seq. (EAJA), and the Board's Rules and Regulations, 29 CFR § 102.143, et seq. The General Counsel's answer of June 7, 1996, urged that the application be denied because the Government's position in the unfair labor practice proceeding was substantially justified. Nyeholt filed a June 28, 1996 reply to the General Counsel's answer. On July 10, 1996, Nyeholt filed a motion to amend its application, to which the General Counsel did not respond.

FINDINGS OF FACT

I. PROPRIETY OF AN AWARD

Section 504(a)(1) of EAJA provides that an award of reasonable attorneys' fees may be made to a party prevailing against the Government unless "the position of the agency . . . was substantially justified." The term "substantially justified" has been defined as "justified to a degree that could satisfy a reasonable person" or as having a "reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). The Board has long held that credibility issues, which cannot be resolved after a thorough investigation by the Board's General Counsel, must be decided at a hearing before an administrative law judge. E.g., *Alpha-Omega Electric*, 312 NLRB 292, 293 (1993). Where litigation is necessitated by the existence of a substantial credibility issue and the General Counsel presents a prima facie case at the hearing, his position is deemed to have a reasonable basis in fact and law and to be substantially justified. *Barrett's Interiors*, 272 NLRB 527, 528 (1984); and *SME Cement, Inc.*, 267 NLRB 763 (1983).

The ultimate issue in the underlying proceeding was whether Nyeholt fired five of its employees or whether those employees voluntarily quit. Certain facts relevant to that issue were undisputed: (1) no words of termination were ever spoken by any of Respondent's agents or supervisors;[1] (2) at noon on September 28, the five employees were clearly and explicitly told to take one afternoon off without pay;[2] (3) the employees' subsequent request to work for the remainder of that day was rejected;[3] and (4) no one ever instructed the employees not to return to work on the following day.[4] The General Counsel argued that the foregoing facts confused the five employees as to whether they had been discharged. Based on five additional findings, I rejected that argument. The General Counsel now asserts that three of the five find-

[1] None of the witnesses who spoke to the matter testified otherwise.

[2] Craig Barnes, an alleged discriminatee who took the stand on behalf of the General Counsel, so testified without controversion.

[3] Barnes so testified without controversion.

[4] No witness on this matter testified to the contrary.

ings were based on credibility resolutions where I credited Nyeholt's witnesses and rejected the testimony of the General Counsel's witnesses.[5]

The first such finding was that (1) Union Business Agent Charles Dodson, responding to a request for four ironworkers for a job beginning September 29, told Construction Labor Services (CLS), during the week of September 25, that he had in mind four workers who had received their experience working for a nonunion contractor;[6] and (2) Dodson admittedly never made an effort to contact any ironworkers other than Respondent's employees for the CLS project.[7] The conversation between Dodson and the CLS representative was credibly related by the latter and was never denied by Dodson. Dodson's admission that he did not contact any ironworkers other than the alleged discrimnatees is not controverted by his testimony that he could have secured four other ironworkers.[8] In sum, (1) the challenged finding set out above did not turn on a credibility resolution; and (2) Dodson's testimony that he could have secured ironworkers other than the alleged discriminatees, if credited and relied on, would have no effect on my determination that the latter were not discharged.

A second finding that the General Counsel appears to argue was the product of an adverse credibility resolution was that "all five employees took their personal tools with them when they left Respondent's premises at noon on September 28." Dodson so testified, and his further testimony to the effect that he recommended the removal does not require rejection of my finding. Again, (1) the challenged finding did not turn on a credibility resolution; and (2) Dodson's testimony that he told the employees to remove their tools to prevent trouble with Nyeholt, if credited and relied on, would have no effect on my determination that the employees were not fired.

The final finding which the General Counsel contends was the product of an adverse credibility resolution was as follows: "one of the five employees, without provocation, asked how he was to be paid for his work that week, a wholly unnecessary question if he intended to be in [Nyeholt's] employ the following payday." Craig Barnes, an alleged discriminatee who testified on behalf of the General Counsel, and Kris Young, an alleged discriminatee sponsored by Nyeholt, testified to this effect without controversion. The testimony of Adam Hutchinson, a witness on behalf of the General Counsel and the third and final alleged discriminatee who testified, indicated only that Nyeholt's president stated that the employees' checks would be mailed the following week, and his account left open the question of whether she was answering a question or volunteering information. Accordingly, I find that the challenged finding did not turn on a credibility resolution. Even if a question of credibility were deemed to underlie the finding set out above, that question would have been generated by a conflict between two of the General Counsel's witnesses, rather than a witness for the General Counsel and one for Nyeholt. In addition, since this conflict was apparent before the unfair labor practice complaint was issued,[9] the General Counsel's apparent failure to resolve the matter by questioning the remaining alleged discriminatees[10] smacks of an improperly conducted investigation. See *American Concrete Pipe Co.*, 290 NLRB 134, 135 (1988). For the foregoing reasons, I find that the General Counsel has not demonstrated that (1) its case had a reasonable basis in fact or (2) its position in the unfair labor practice litigation was substantially justified. Accordingly, I conclude that Nyeholt is entitled to appropriate fees and expenses.

II. AMOUNT OF AWARD

A. *Fees in Excess of $75 an Hour*

Nyeholt has claimed fees for attorneys and legal assistants based on hourly rates ranging from $75 to $180. As correctly noted by the General Counsel, fees in excess of $75 an hour may be awarded only when an agency has so provided by rule or regulation. 5 U.S.C. § 504(b)(1)(A). Inasmuch as the Board has never adopted such a rule or regulation, the fees which comprise a portion of this award will be limited to $75 an hour.

B. *Reasonableness of Fees Claimed in Application*

Nyeholt's amended application seeks $33,206.25 in fees and expenses of $3,454.10. The General Counsel argues that Nyeholt's application "is excessive and is replete with unreasonable and unnecessary charges"[11] but identifies only three alleged instances of excess. Nyeholt demurs as to each.

[5] The General Counsel's memorandum in support of answer to application for attorneys' fees and expenses pursuant to the Equal Access to Justice Act and the Board's Rules and Regulations (answer memorandum) does not allege that adverse credibility resolutions underlay the other two findings, which were as follows: (1) before any interaction took place between Nyeholt's representatives and the five employees, three of them indicated that they were going to be working for another employer the following morning; and (2) four of the five alleged discriminatees actually went to work for Construction Labor Services the following morning.

[6] Nyeholt was a nonunion contractor.

[7] My finding that the record did not contain any "direct evidence that the Union ever promised jobs to [Nyeholt's] employees if they voluntarily terminated their employment with [Nyeholt]" merely notes an absence of "direct" evidence on the question and does not constitute an answer to it.

[8] Contrary to the assertion in the General Counsel's answer memorandum, there is no evidence of record, regardless of whose witnesses are credited, which would support a finding that the five employees were discharged at noon on September 28. Because the alleged discriminatees' purported confusion could not have arisen before 5 p.m. on September 28, Dodson's admitted failure to attempt to secure other ironworkers for a job beginning the following morning is not insignificant.

[9] The accounts contained in the General Counsel's April 6, 1995 affidavits from Barnes and Hutchinson, which were appended to the answer memorandum, correspond directly to the witnesses' testimony at the hearing.

[10] The General Counsel (1) failed to deny Nyeholt's allegation that all of the alleged discriminatees were not interviewed prior to issuance of the complaint; and (2) commented to the effect that Nyeholt could not prove the allegation. First, Nyeholt does not bear the burden of proving that the General Counsel's investigation was properly conducted or that the position resulting from that investigation was substantially justified. See 29 CFR § 102.144(a). Second, I infer from the General Counsel's failure to deny the allegation or to offer proof that a thorough investigation was conducted that the two remaining witnesses were, in fact, not interviewed.

[11] Answer memorandum at 13.

First, the General Counsel notes that two attorneys appeared for Nyeholt at the hearing and contends that the services of the second attorney were unnecessary. Nyeholt replies as follows:

> With five alleged discriminatees, Nyeholt Steel's attorneys reasonably anticipated that it might become necessary to have one person leave the hearing to obtain rebuttal evidence and/or witnesses, while the other continued to take part in the hearing.
>
> As it turned out, the General Counsel's witnesses provided testimony that supported Nyeholt Steel's position rather than contradicting it. The ultimate result does not change the fact that it was reasonable for Nyeholt Steel's attorneys to be prepared.

Because Nyeholt's case-in-chief demonstrated exceptionally thorough trial preparation by its counsel, I accept their reasoning that they intended to be equally thorough in meeting the General Counsel's evidentiary presentation. Accordingly, I find that the presence of two attorneys at the hearing was reasonable under the instant circumstances.

Second, the General Counsel argues that the 61.5 hours claimed for the research and writing of Nyeholt's posthearing brief is excessive given "the nature of the case and the size of the transcript."[12] Nyeholt's brief was 19 pages in length, well organized, cogently reasoned, and sufficiently detailed[13] to provide substantial assistance to the trier of fact. Accordingly, I find that the number of hours required to prepare that brief was reasonable under the circumstances of this case.

Third, the General Counsel contends without citing decisional authority that Nyeholt's "submitting claims for minimums of a quarter hour" does not accurately reflect "the time actually spent in the representation of the applicant" within the meaning of 29 CFR § 102.144(c)(3) and Nyeholt "should be reimbursed for actual time spent, not just billed."[14] The Board has employed billable time in rounded increments as a surrogate for the "time actually spent" representing an applicant. See *American Concrete Pipe Co.*, supra, 290 NLRB at 135–138. Moreover, the concept of EAJA awards based on quarter-hour increments of billable time has been validated by the courts. E.g., *Wonders v. Shalala*, 822 F.Supp. 1345, 1349 (E.D.Wis. 1993). For the foregoing reasons, I reject the General Counsel's contention.

Although the matter was not raised by the General Counsel, the award granted here will be reduced to exclude those fees claimed by Nyeholt for work on that portion of the unfair labor practice proceeding relating to the issue of interrogation, the single issue as to which Nyeholt did not prevail.[15]

CONCLUSIONS OF LAW

1. On May 4, 1995, the date on which the original complaint in the underlying unfair labor practice proceeding was issued, Nyeholt was a corporation with fewer than 500 employees and a net worth of less than $7 million.
2. Nyeholt prevailed in a significant and discrete substantive portion of the underlying unfair labor practice proceeding, which was an adversary adjudication.
3. The General Counsel's position in a significant and discrete substantive portion of the underlying unfair labor practice proceeding was not shown to be substantially justified.
4. Nyeholt is entitled to attorneys' fees in the amount of $16,843.75 and expenses in the amount of $3,454.10.

[Recommended Order omitted from publication.]

[12] Answer memorandum at 14.

[13] Nyeholt's brief contained 91 citations to the record and 9 citations to relevant authorities.

[14] Answer memorandum at 14.

[15] The General Counsel's initial contention that Nyeholt cannot claim fees charged in connection with the preparation of an EAJA application was withdrawn in the General Counsel's July 10, 1996 letter to me.